COMPLIANCE BOARD OPINION NO. 97-3

April 16, 1997

Ms. Jane Ball Shipley

The Open Meetings Compliance Board has considered your complaint regarding alleged violations of the Open Meetings Act by the Board of Trustees and Directors of the Enoch Pratt Free Library of Baltimore City ("Pratt Board"). Although your complaint focuses on a meeting held on December 11, 1996, the issue is a more general one: Is the Pratt Board a "public body" and therefore subject to the Act? In our opinion, it is.

I

Complaint and Response

In your complaint, you allege that on December 11, 1996, you attended a meeting scheduled for 12:30 p.m. in the Poe Room at the Enoch Pratt Free Public Library of Baltimore City. At 12:35 p.m., you observed ten Pratt Board members coming out of the non-public area of the Library, where the official board room is located. You surmised that these members had lunch there before adjourning to the Poe Room. You then asked Ms. Virginia Adams, the Pratt Board's Chair, if she could assure you that the Pratt Board was not violating the Open Meetings Law during its private gathering, and Ms. Adam's response ("boards can discuss things among themselves as long as they take their actions in public") suggested to you that substantive discussion had occurred in private.

During the December 11 meeting, a Pratt employee referred to information given to new Pratt Board members at a previous meeting. According to your complaint, no notice of that meeting was provided to the public.

In a timely response on behalf of the Pratt Board, its counsel, Paul A. Tiburzi, Esquire, asserted that the Pratt Board is a private entity not subject to the Act. Mr. Tiburzi did not deny that the Pratt Board has held substantive discussions in private. Rather, the contention is that the Open Meetings Act is simply inapplicable to any meeting that the Pratt Board might hold.

II

Definition of "Public Body"

The Open Meetings Act applies only to meetings of "public bodies." The Act's general command that meetings be open to the public is phrased this way: "Except as otherwise expressly provided in [the Act], *a public body* shall meet in open session." §10-505. Likewise, the Act's notice requirement calls on "*a public body* [to] give reasonable advance notice of [a] session."

A "public body" is defined as "an entity that":

(i) consist of at least 2 individuals; and

(ii) is created by

1. the Maryland Constitution;
2. a State statute;
3. a county charter;
4. an ordinance;
5. a rule, resolution, or bylaw;
6. an executive order of the Governor; or
7. an executive order of the chief executive authority of a political subdivision of the State.

§10-502(h)(1) of the State Government Article.[1]

III

Applicability to Pratt Board

A State statute appears to have created the Pratt Board. In Chapter 181 of the Laws of Maryland 1882, the General Assembly, among other things, named nine people "and their successors [to] be and they are hereby constituted and appointed 'the Board of Trustees of the Enoch Pratt Free Library of Baltimore City,' and they and their successors are hereby constituted and appointed a body politic and corporate by the name of the

[1] Under §10-502(h)(2), the term "public body" also extends to certain entities appointed informally by the Governor or a local chief executive. *See* Compliance Board Opinion No. 96-14 (December 19, 1996). This provision has no relevance here.

'Enoch Pratt Free Library of Baltimore City' with power ... to do all necessary things for the control and management of said Library and its branches ...."

Yet the Pratt Board, through its attorney, insists that this appearance is deceiving. The Pratt Board, so it is argued, was created as, and remains, a purely private entity. The 1882 legislation was needed to ratify the City's decision to accept Enoch Pratt's gift of the Library, a decision that entailed the creation of a debt for future maintenance. The provisions about the Pratt Board, it is suggested, merely ratify Enoch Pratt's insistence that the Library be managed by a private board.

The Compliance Board has not before considered a contention that an entity created by statute nevertheless is not properly to be viewed as a "public body," for purposes of the Open Meetings Act. Indeed, it is possible that an entity might be private despite legislation chartering the entity. So the Circuit Court for Baltimore City and the Attorney General recently held regarding the Maryland School for the Blind. *See Maryland School for the Blind v. National Federation of the Blind*, Case No. 96176040/CE213867 (February 24, 1997) (ratifying Opinion of the Attorney General No. 96-011 (February 29, 1996) (unpublished)). As we ourselves held in a prior opinion, the Open Meetings Act is intended to reach the meeting practices of governmental entities, not private corporate boards. Compliance Board Opinion No. 96-14, at 3 (December 19, 1996).

When, as here, an entity was originally chartered by statute, the Compliance Board will engage in a two-step inquiry: (1) Did the original statute reflect a legislative intention to create a governmental, rather than a private, entity? (2) If so, do subsequent legislative actions confirm the entity's governmental character or, conversely, suggest that what was once a governmental entity has been transformed into a private one?[2]

In answering the first question, we must give careful attention to the historical context of the statute before deciding whether the entity "created by" that statute was governmental or private. In this instance, we have the great advantage of an opinion by the United States Court of Appeals for the Fourth Circuit that describes and analyzes the history.

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[2] This second question parallels the Compliance Board's approach when an entity was privately incorporated at its inception. Then the question is whether subsequent developments have transformed the entity into a governmental one. In Compliance Board Opinion 96-14, we concluded that, despite a change in the corporation's charter that gave the Mayor of Baltimore the power to appoint the board of directors, the Baltimore Area Convention and Visitors Association, Inc. had not been transformed into a governmental "board."

The case, *Kerr v. Enoch Pratt Free Library of Baltimore City* (4th Cir. 1945), involved a claim that racial discrimination in employment by the Library violated the Fourteenth Amendment. In deciding that the Library was "an instrumentality of the State of Maryland," 149 F.2d at 219, the court considered the significance of the 1882 statute. The court recognized that the statute implemented the private philanthropy of Enoch Pratt, who had insisted that the Library be managed by an apolitical board, "lest [the Library's] management ... fall into the hands of local politicians who would impair its efficiency by using it for selfish purposes." 149 F.2d at 215. In a sense, the real "creator" of the Pratt Board was Pratt himself.

Yet it was the legislative act that gave legal effect to Pratt's design. As the Fourth Circuit put it:

> The donor could have formed a private corporation under the general permissive statutes of Maryland with power to both own the property and to manage the business of the Library independent of the state. He chose instead to seek the aid of the state to found a public institution to be owned and supported by the city but to be operated by a self-perpetuating board of trustees to safeguard it from political manipulation; and this was accomplished by special act of the legislature with the result that the powers and obligations of the city and the trustees were not conferred by Mr. Pratt but by the state at the very inception of the enterprise.

149 F.2d at 216-17. The court went on to express its view "that although Pratt furnished the inspiration and the funds initially, the authority of the state was invoked to create the institution and to vest the power of ownership in one instrumentality and the power of management in another .... We know of no reason why the state cannot create separate agencies to carry on its work in this manner ...." 149 F.2d at 218.

The main piece of contrary evidence is that the Pratt Board was created as self-perpetuating: The Pratt Board, not a government official, picks its successors. This fact often indicates that the entity in question is not a public agency. *See A.S. Abell Publishing Co. v. Mezzanote*, 297 Md. 26, 38 (1983). The self-perpetuating nature of the Pratt Board, however, is attributable to the Legislature's agreement with Enoch Pratt that the Board should be apolitical. But, as the Fourth Circuit found in *Kerr*, apolitical does not mean nongovernmental. The Pratt Board was created by statute in order to carry out a State function — the maintenance of a public library. Moreover, unlike the School for Blind, the Pratt Board was created at a time when the general

corporation law was available to create a private charitable corporation. As the Fourth Circuit recognized, Enoch Pratt "could have formed a private corporation ... with power to both own the property and to manage the business of the library independent of the state," but he chose not to do so.[3]

In short, the analysis in the *Kerr* case enables us to answer the first question unequivocally: The 1882 statute reflected a legislative intention to create the Pratt Board as a governmental, rather than a private, entity.

Turning to the second question, in our opinion (and again unlike the School for the Blind), subsequent legislative developments tend to reinforce the Pratt Board's original character as a governmental, not private, entity. Section 23-402(a)(2) of the Education Article recognizes the 1882 statute as the Pratt Board's charter. Furthermore, the Pratt Board is defined as a part of "local government" for purposes of the Local Government Tort Claims Act. *See* §5-401(d)(11) of the Courts and Judicial Proceedings Article.[4]

IV

Conclusion

For the reasons given above, we hold that the Pratt Board is a "public body." This means that the Pratt Board is, in general, subject to the Open Meetings Act. The Pratt Board should henceforth consider whether a particular meeting is itself is subject to the Act.

The Act does not apply to every meeting. If, for example, the Pratt Board were to meet to carry out an "executive function," the Act would not apply to that meeting. §10-502(a)(1)(i).[5] For meetings of the Pratt Board that are

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[3] At an earlier time, when private incorporation was unavailable, the existence of a statutory charter would not be inconsistent with the private status of the resulting entity. Examples (outside the context of the Open Meetings Act) may be found in 63 *Opinions of the Attorney General* 106 (1978).

[4] We do not deem taxpayer support of the Pratt Library to be a factor confirming the Pratt Board's governmental status. As the Attorney General suggested in Opinion No. 96-011, the degree to which public funds support an entity is immaterial to its status under the Open Meetings Act.

[5] In general, the "executive function" exclusion from the Act applies to a public body's application of previously established law or policy. If a public body is discussing the development of new policy, the "executive function" exclusion is inapplicable. *See*

covered by the Act, the Pratt Board should give proper notice of the meetings and conduct them in open session, unless one of the specific exceptions set out in §10-508 would permit a portion of a meeting to be closed.

OPEN MEETINGS COMPLIANCE BOARD*

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*Chairman Walter Sondheim, Jr., did not participate in the preparation of this opinion.

Office of the Attorney General, *Open Meetings Act Manual* 10 (2d ed. 1995).